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IN THE

Supreme Court of the United States

October Term, 1960

No. 902

MOHEGAN INTERNATIONAL CORPORATION,

Appellant,

against

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, Comptroller of the City of New York, HILDA G. SCHWARTZ, Treasurer of the City of New York and JOSEPH E. KEEGAN, Collector of the City of New York,

Appellees.

MOTION TO DISMISS APPEAL

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May 5, 1961

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Preliminary Statement

The appellant has appealed from a final judgment of the Court of Appeals of the State of New York dated January 12, 1961, unanimously affirming a judgment of the Appellate Division of the Supreme Court of that State, which court had unanimously affirmed, without opinion, a judgment of the Supreme Court of that State.

The opinion of the Court of Appeals is officially reported in 9 NY 2d 69 and is set forth in Appendix A of the appellant's jurisdictional statement. The decision of the Appel-

late Division is officially reported in 10 AD 2d 841 and the opinion of the Supreme Court in 17 Misc 2d 104.

By this appeal, the appellant challenges the constitutional validity of the New York City General Business and Financial Tax as imposed on it for the privilege of carrying on business within the City to the extent that the tax is measured by its gross receipts from business as a foreign freight forwarder. It contends that the tax, to the extent that it is measured by such receipts, is repugnant to the Commerce Clause and the Import-Export Clause.

Appellees move to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes Involved

The statute authorizing the City of New York to impose the tax is referred to in Appendix B of the appellant's jurisdictional statement. The local law of the City of New York imposing the tax is Title B of Chapter 46 of the Administrative Code of the City of New York.

Statement of the Case

This is an action brought by the appellant for a declaratory judgment holding its receipts as a foreign freight forwarder not subject to tax by virtue of the Commerce Clause and Import-Export Clause of the Federal Constitution and to recover the tax paid for the year 1956. After issue was joined an examination before trial of appellant was held. Both sides then moved for summary judgment.

The trial court granted appellees' motion and denied appellant's motion, and entered judgment declaring the tax constitutional as applied to appellant's receipts as a foreign freight forwarder and denying appellant recovery of the tax paid. Upon appeal by appellant, the Appellate Division, First Department, unanimously affirmed the judgment and upon further appeal the New York Court of Appeals unanimously affirmed.

The Appellate Division wrote no opinion. The trial court and the Court of Appeals both wrote opinions and both held the case to be controlled by *Canton Railroad Co.* v. *Rogan*, 340 U. S. 511 (1951), and *Western Maryland Railway Co.* v. *Rogan*, 340 U. S. 520 (1951).

Facts

(1)

Appellant is a New York corporation, with its sole place of business at 17 State Street in the Borough of Manhattan, City of New York (fol. 97). It is engaged in three kinds of business, all connected with foreign commerce: foreign freight forwarding; foreign freight brokerage; and customhouse brokerage (fols. 99, 270-272).

Foreign freight forwarding consists of furnishing services to domestic shippers and foreign purchasers in connection with exports of goods from this country (fols. 220-221; 225, 228, 232-233, 242).

Foreign freight brokerage is the solicitation of cargo and performance of related services for ocean carriers (steamship companies) (fols. 226-228, 242).

Customhouse brokerage consists of services performed for importers in connection with imports of goods into this country. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 203-204 (1944).

The present case involves the tax only on appellant's receipts as a foreign freight forwarder (fols. 269-270). The City Comptroller has ruled that appellant's receipts as a foreign freight broker are not taxable (fols. 270-271; Pltff's. Exh. 2). Appellant has paid the tax on its receipts as a customhouse broker, and does not contest the tax on those receipts (fols. 244-246, 272).

For the calendar year 1956 appellant filed a return and paid tax on the following receipts (fols. 111-116; Defts.' Exhs. A, B and Q):

Types of Receipts	*Amount*	*Tax (¼ of 1%)*
Foreign freight forwarding	$244,059.81	$ 610.15
Foreign freight brokerage	194,738.10	486.85
Customhouse brokerage	11,935.12	29.83
Total	$450,733.03	$1,126.83

The City has refunded the $486.85 of tax paid on the foreign freight brokerage receipts. Appellant has waived refund of the $29.83 of tax paid on the customhouse brokerage receipts, leaving in issue, for 1956, the $610.15 of tax paid on the foreign freight forwarding receipts.

(2)

Appellant has six officers and sixty employees, all located at 17 State Street, New York City, which is a general office building in which appellant occupies two-thirds of a

floor (fols. 99, 104-105). Appellant has no warehouses or facilities for handling cargo, the premises being devoted solely to office activities (fols. 104-105).

As a freight forwarder appellant acts as the representative of the shipper (and occasionally of the foreign purchaser) in connection with the exportation of goods from this country (fols. 117-119, 228).

The services furnished by appellant with respect to a given export shipment are performed by one of its employees at the office in New York City. A single employee handles all aspects of a particular transaction or shipment from beginning to end (fols. 246-249).

The services involve communications, by telephone or messenger, with offices of carriers, consuls, insurance companies, the United States Customs and banks—all in New York City—and by telephone, telegraph, cable or mail, with the offices of shippers and consignees outside of the City (fols. 129-130, 143-146, 157-158, 164-166, 179-184, 300-303, 316-317, 380). All of appellant's business is physically transacted within the City (fol. 467).

(3)

In its capacity as a freight forwarder, appellant is not itself the shipper or exporter and has no beneficial interest in the goods being exported (fols. 159-160, 364-366, 443, 597). It is not a common carrier (fol. 380). It does not take physical possession of the exported goods at any time, or assume any liability for their loss or damage (fols. 259-260, 362, 420-423, 573).

Appellant is not in any way affiliated with the shippers or consignees it represents as a foreign freight forwarder; it operates as an independent contractor (fols. 381-382). The shipper does not supervise its activities (fols. 432-433). Its president testified that "The shipper advises us as to the end results he wishes to accomplish. The methods are ours." (fols. 433-434).

(4)

Usually appellant acts both as a foreign freight forwarder (on behalf of the shipper) and as a freight broker (on behalf of the ocean carrier) on the same shipment, although not always (fols. 240-242). In a case where the shipper charters a ship for the cargo, a forwarder would only do the forwarding work (fol. 242).

In acting for the steamship company as a freight broker, appellant is paid by the steamship company a brokerage commission, consisting of a percentage of the freight charge, usually amounting to 1¼% of the ocean freight; and, in special circumstances, amounting to 2½% of the freight (fols. 227, 229).

On the other hand, in acting for the shipper as a foreign freight forwarder, appellant is paid by the shipper a fee of between $10 and $20 per shipment (fols. 424-425). This fee is not based on the freight charge or on the value of the merchandise shipped, but on the time consumed by appellant in doing the work (fols. 141-142, 230, 610-611).

In its capacity as a foreign freight forwarder, appellant also makes separate charges for local accessorial services, such as furnishing consular blanks, coopering, local truck-

ing and warehousing and arranging for marine insurance (fols. 119, 123-129; Defts.' Exh. B). During 1956 these accessorial charges totalled $41,175.39 or 17% of its freight forwarding receipts.

(5)

Appellant's president testified that the forwarding fee it charged the shipper covered services rendered in (a) expediting the movement of the cargo to New York, (b) the preparation of export documents, and (c) the delivery of documents to the bank (fols. 232-233). A fourth activity, performed in connection with the movement of the goods to the ship after their arrival in port, was described by him as a coordinating service and was listed by him among both the brokerage and the forwarding services (fols. 226, 232-233).

The details of the services performed by appellant under each of these four heads are as follows:

(a) *Expediting.* This consists of tracing the movement of the goods in the possession of the railroad (after the shipper has delivered them to the railroad) to make sure the goods arrive in port on time (fols. 151-152). It is done through an employee of appellant at its office in New York City by telephone or personal calls to the railroad company's office in New York City (fols. 234, 380). Appellant never sends anyone out "on a railroad line, or anything like that" (fol. 234).

Appellant does not physically move the goods; normally it does not even see the goods; it does this work by simply

keeping in close touch with the railroad's New York City office (fols. 260-262, 378-380). The goods are in the physical custody of the carrier, not of appellant, at all times (fols. 420-421).

(b) *Preparation of documents.* The documents prepared by appellant in its capacity as a forwarder are (i) the export declaration, (ii) certificate of origin, (iii) consular invoice, (iv) insurance certificate, and (v) letter of transmittal (Defts.' Exhs. F, p. 217; G, p. 219; I, p. 223; J, p. 225; K, p. 227).

(i) The export declaration (Defts.' Exh. F, p. 217) is prepared by appellant in quadruplicate; taken by one of its messengers to the Customs House for approval and signature by the Customs authorities and a copy is furnished to the steamship company's office, as this "allows them to load the cargo" (fol. 157-158, 326-327). Appellant signs the declaration as agent of the exporter (fols. 159, 324).

(ii) The certificate of origin (Defts.' Exh. G, p. 219) is used only in connection with exports to certain countries (fol. 329). It states that the goods are of American origin; is signed by appellant as agent of the shipper; and contains a certification by the Commerce and Industry Association that it has examined the invoice and finds that the products originated in the United States. It is part of appellant's job as a forwarder to have the Commerce and Industry Association, at its office in New York City, execute the certificate (fols. 328-329).

(iii) The consular invoice (Defts.' Exh. I, p. 223) contains the same information as the commercial invoice, but

is in the language of the country of destination, and after preparing it appellant has it visaed by the consulate in New York City of that country (fols. 130-131, 338-340).

(iv) The insurance certificate (Defts.' Exh. J, p. 225) insures the shipper or consignee, as their interest may be, against loss of the goods (fols. 340-343). Appellant is neither the insurer nor the insured; it acts on behalf of the shipper in obtaining the coverage; and receives a portion of the premium for rendering the services (fols. 176-179, 212-213, 342). In arranging for this insurance appellant acts as an insurance broker (fols. 485-487).

(v) The letter of transmittal (Defts.' Exh. K, p. 227) is a covering letter used by appellant in delivering copies of the documents to the bank (fols. 343-344).

(c) *Delivery of documents to the bank.* When the ocean carrier has signed the ocean bill of lading, and the various documents have been prepared, "the actual exporting of the goods has been accomplished" (fol. 185). At this point the appellant assembles the documents and presents them to a bank in New York City, which then makes payment to the shipper under the letter of credit (fols. 181, 345-348). Appellant submits the papers to the bank after the carrier has loaded the goods on the ship, such loading being the responsibility of the carrier and not of appellant (fols. 189-191; 370-372).

Normally, appellant delivers seven documents to the bank, consisting of the aforesaid five documents prepared by it as a forwarder, plus a sight draft and the steamship bill of lading (fols. 213-220).

d. *Coordinating.* The coordinating services were performed by appellant after the goods arrived in New York and consisted of arranging a mutually satisfactory time for the railroad to deliver the goods to the steamship or pier (fols. 361-364). The railroad was required, under its contract with the shipper, to deliver the goods to the steamship company, and appellant never sent people to the pier or to accompany the lighter (fols. 362, 378-380).

POINT I

Since appellant's services as a foreign freight forwarder are performed within the City of New York and are local in nature, the Commerce Clause does not bar the tax on its receipts from such services.

(1)

The jurisdictional statement, in stating the questions presented (p. 4), describes appellant's foreign freight forwarder services as the "arranging for the movement of export cargo" and "forwarding of cargo." The identical description of its activities in appellant's Court of Appeals brief led that Court properly to term it a "little overstatement" since the appellant (Juris. Statement, App. A, p. 22):

> "never handles these goods at all * * * but performs for the shipper at New York City incidental services * * *. Appellant, of course, is not itself a shipper or exporter or common carrier, has no ownership of or other interest in the goods and never has actual or constructive possession of the goods or responsibility for them."

The Court accurately summarized appellant's forwarding functions as consisting of "tracing" the shipment from inland to seaboard (consisting of obtaining information from the railroad as to where the goods were from time to time); preparing a number of documents and getting them signed and filed with the Customs House or banks; and obtaining insurance for the shipper (*id.*, at p. 24). From this it concluded that the tax was valid because imposed on receipts from local services "not including any actual transportation services or any responsibility for such service" (*id.*, at p. 25).

(2)

The tax in the present case, so far as the Commerce Clause issue is concerned, is sustained by *Canton Railroad Co.* v. *Rogan*, 340 U. S. 511 (1951), where a Maryland franchise tax, measured by gross receipts, was held to be valid under the Commerce Clause as applied to the receipts of a railroad company located in Baltimore. The receipts taxed arose from the furnishing of switching, wharfage, storage and weighing services, and the supplying of a crane at the pier, in connection with the movement of goods into and out of the country through the Port of Baltimore.

The tax was upheld on the ground that "a nondiscriminatory gross receipts tax on an interstate enterprise may be sustained if fairly apportioned to the business done within the taxing state" (p. 515). Although the tax was on 100% of the railroad company's receipts, it was upheld since all of the railroad's activities were in the taxing state.

The present appellant, like the Canton Railroad, furnishes services connected with the transportation of goods in foreign commerce, and its activities are similarly carried on entirely within the taxing jurisdicton. The *Canton* case would seem to be controlling here.

The appellant's contention that the *Canton* case did not pass on the Commerce Clause question is refuted by the express reference in the opinion in that case to the railroad's objection "on the ground that interstate commerce is involved" (p. 515), and the railroad's argument of the point both in its main brief (POINT IV, pp. 54-57), and in its reply brief (pp. 1-4).

(3)

In *United States* v. *American Union Transport, Inc.*, 327 U. S. 437 (1946), this Court described the foreign freight forwarder as an agent of the shipper, acting as a "go-between" with the carrier, having no part in the transportation service proper and no responsibility for the transportation of the goods (pp. 443, 444, 448, 450, 456).

Analogous services, though connected with, and even essential to, interstate commerce have been held to be not part of the actual interstate transportation service and to constitute a local business subject to taxation by the state: *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90, 94-95 (1937); *Federal Compress Co.* v. *McLean*, 291 U. S. 17 (1934); *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. 21 (1904); *Nathan* v. *Louisiana*, 8 Howard (49 U. S.) 73 (1850); *Matter of Pekao Trading Corp.* v. *Bragalini*, 9 AD 2d 359 (3rd Dept., 1959), aff'd 8 NY 2d 903 (1960), app. dis. 364 U. S. 478 (1960); *Alaska* v. *Arctic Maid*, — U. S. —, decided May 1, 1961.

The fact that appellant's business is regulated under the Shipping Act does not bar the tax, since local activities clearly subject to state taxation may, nevertheless, be subject to federal regulation where the purpose to be accomplished by the federal regulation requires it. *State of California* v. *United States*, 46 F. S. 474, 477 (D. C. Calif., 1942), aff'd 326 U. S. 577 (1944); *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 22-23 (1934); *Braniff Airways* v. *Nebraska State Board*, 347 U. S. 590, 594-597 (1954); *United States* v. *Darby*, 312 U. S. 100, 118-123 (1941).

(4)

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90, 94 (1937), it was held that activities of the taxpayer in that case in supplying longshoremen to shipowners "without directing or controlling the work of loading or unloading" were not interstate or foreign commerce but a local business subject to taxation by the state. The forwarding services supplied by the appellant in the present case similarly constitute a local business.

Its so-called "expediting" and "coordinating" services consisted of making telephone calls to the carriers' offices in New York City. The documentary services consisted of preparing export documents, delivering them to various offices in the City and mailing copies to the exporter and foreign importer. The accessorial services, for which appellant made a separate charge, consisted of the sale of consular blanks, arranging for coopering, for local trucking and for warehousing of the goods after their arrival in the City, and acting as an insurance broker.

All of these services were performed in the City of New York, and in performing them appellant at no time directed or controlled the transportation of the goods. It never itself took physical possession of the goods or assumed any liability for their loss or damage. Thus it was not itself engaged in interstate or foreign commerce, any more than the concern was that supplied stevedores to shipowners in the *Puget Sound* case.

Similar services furnished by customhouse brokers (with respect to imports) have been held subject to state taxation in Louisiana [*State* v. *Wm. J. Oberle, Inc.*, 190 La. 1053, 183 So. 347 (1938)] and subject to state regulation in Minnesota [*Union Brokerage Co.* v. *Jensen*, 215 Minn. 207, 9 N. W. 2d 721 (1943), aff'd 322 U. S. 202 (1944)].

(5)

Texas Transport & Terminal Co., Inc. v. *City of New Orleans*, 264 U. S. 150 (1924), on which appellant principally relies, involved a local tax on steamship agencies. The tax was held invalid under the Commerce Clause as applied to compensation received by a steamship agent from a number of steamship lines which it represented in the port.

The record in that case showed that the Texas Transport company operated as the steamship companies' office in the port. It not only solicited cargo, but it directed and controlled the entire process of ocean carriage. It selected the ships to be used, signed for delivery of the cargo on the wharfs, supplied and equipped the ships, engaged and supervised the stevedores in loading and discharging cargo,

issued bills of lading, collected the freight charges and paid ships' disbursements. The present appellant, in performing its services as a forwarder, admittedly furnished none of these services (fols. 384-397).

This Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90 (1937), in sustaining the tax on the business of supplying stevedores to shipowners, distinguished the *Texas Transport* case, stating that there was "little analogy" between the activities of furnishing stevedores and those of agents acting for steamship companies and entering into binding contracts for them.

(6)

The appellant's rather incredible contention that its activities as a freight forwarder are the same as its activities as a freight broker (Juris. Statement, p. 10) is completely refuted by the evidence that the two activities are separate, distinct and different (*Cf.* fols. 226-227 and 232-233; fol. 242).

That the activities taxed herein were not the same as those furnished by appellant to the ocean carriers is clear from *United States v. American Union Transport, Inc.*, 327 U. S. 437 (1946), which emphasized that foreign freight forwarders *do not render any services to the carriers at all* (*Id.*, at pp. 443, 448, 458, 462). See, also, *American Union Transport v. United States* 257 F. 2d 607 (D. C. Circ., 1958), cert. den. 358 U. S. 828 (1958), where the difference in function between foreign freight forwarders and foreign freight brokers is delineated.

POINT II

The Import-Export Clause does not bar the tax since appellant's services as a foreign freight forwarder are performed in connection with bringing the exported goods to the water's edge, and are not part of the export process.

(1)

In *Canton Railroad Co.* v. *Rogan*, 340 U. S. 511 (1951) this Court made a clear distinction between *goods* in import or export and the *handling of the goods* at the port, holding that an articl may itself be an import or export and be immune from tax before and after it reaches the port, but that, when the tax is on activities "connected with the export or import," the acts constituting the export or import process "begin and end at water's edge," concluding (p. 515):

> "that any activity more remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is not a part of the export or import process."

It held that, for state tax purposes, "the handling of the goods at the port" was not "part of the export process," so long as it did not involve loading and unloading of the ship, (*id.*).

In *Western Maryland Railway Co.* v. *Rogan*, 340 U. S. 520 (1951), decided at the same time, this Court repeated the rule, stating that (p. 522):

> "So far as taxes on activities connected with bringing exports to or imports from the ship are concerned, we think the line must be drawn at the water's edge."

(2)

All of the present appellant's forwarding services are performed in connection with bringing exports to the port and to the water's edge. They are included in what this Court in the *Western Maryland* case called the "manifold services * * * involved in the movement of exports * * * within the country" (340 U. S. at p. 522).

The trial court found that appellant's activities as a forwarder ended at the water's edge in New York City (fol. 713), and the Court of Appeals approved this finding (Juris. Statement, App. A, pp. 24-25). The finding is supported by testimony that appellant has no responsibility for the loading of the goods from the pier to the ship, never engages stevedores, and never even sends people to the pier (fols. 370-373, 380).

It is true that appellant does not submit the papers to the bank for payment under the letter of credit until the goods are on board the ocean carrier. But this does not make its services part of the loading process. Appellant simply waits until the carrier has completed this phase of the carrier's responsibility, as the Court of Appeals noted (Juris. Statement, App. A, p. 25).

(3)

The tax on appellant's forwarding services is not in any way comparable to taxes on bills of lading, charter parties or marine insurance policies, such as were held invalid as taxes on exports in *Fairbank* v. *United States*, 181 U. S. 283 (1901), *United States* v. *Hvoslef*, 237 U. S. 1 (1915) and *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U. S. 19 (1915).

Appellant issues no bills of lading and makes no charter party contracts. With regard to marine insurance the appellant concedes that it does not act even as an insurance broker, but merely, on behalf of the shipper, "arranges for such insurance through an insurance broker" (Juris. Statement, p. 5, fn. 1).

CONCLUSION

The appeal to this Court from the judgment of the Court of Appeals of the State of New York should be dismissed.

May 5, 1961

Respectfully submitted,

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